The Place Occupied by the Judiciary in Our American Constitutional System.

Address of

HAMPTON L. CARSON, ESQ.,

of Philadelphia.

BEFORE THE

Virginia State Bar Association

AT THE HOMESTEAD HOTEL

Hot Springs, Va.

July 29th, 30th, and 31st, 1913

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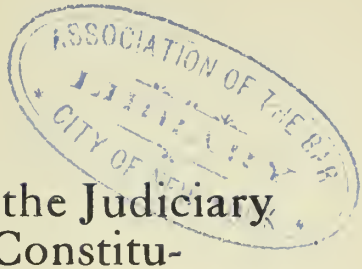

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Mr. President and Members of the Virginia State Bar Association:

My theme to-day is The Place Occupied by the Judiciary in our American Constitutional System. It is a timely topic, for such has been the agitation and criticism of the past eighteen months that many, especially of the younger generation, have concluded that our system is outworn, in need of radical revision, and that any expression of reverence for the work of the fathers of the Republic is lamentable Toryism.

I am going to state the matter in the plainest possible terms. My aim shall be to present an outline drawing, so to speak, so as to exhibit the simple, strong, but majestic features of our political architecture. It is rudimentary that there must be law and order in the land. There must be rules for the common good. There must be some one to make those rules. There must be some one whose duty it is to see that the rules are enforced, and there must be some one to decide in cases of doubt what those rules are and whether they have been broken. Society—peaceable and orderly society—demands this. The same men or set of men cannot act as lawmakers, enforcers of the law and as judges. That would be pure despotism. These separate functions must be divided, and to make things work without friction the body that makes the law ought not to enforce it, and the body that enforces the law ought not to be judge, and

the body of judges ought not to have a hand in the making of the law or its enforcement. When the fathers planned an American form of government they said, in substance, We will divide governmental powers between three great departments, legislative, executive and judicial. Congress, the lawmakers, shall declare what the law shall be. The President must see that the acts of Congress are carried out, and in order that Congress shall not be tyrannical and that the President shall not usurp power, and that the Nation shall not encroach upon the States, and that the States shall not paralyze the Nation, we will write down in the Constitution what powers Congress shall have, define the duties of the President, and in order to secure the observance of the rules by the government, we will create an independent body of men to act as umpires—the Supreme Court. That body must be the final arbiter, and, unless chaos is finally to rule, that Court must have the last word. The dispute must be ended somewhere and at some time. Men and States, Congress and the President, are alike bound by it. It is the same way with the State courts and State constitutions, with this difference. Congress, representing the People and the States in their national capacity, have no powers except such as are expressly given to them by the Constitution, or are fairly necessary to the exercise of the given power. The State legislatures have every power except those which are withheld from them by the National grant, or by the State Constitutions, either expressly or by fair implication. Hence the Constitution of the United States is a grant of power. The State Constitutions are a denial or a limitation of power. In each case the Constitution is a restriction upon the States or the People. In each case the purpose is to protect the minority of the People against the tyranny of the majority. A Constitution represents in the highest sense the People's will as a measure of self-defense against their own imprudence or violence.

That is the American system, and it exists nowhere else except where copied from us. Every student of government the world over has admired and praised it as the wisest and best way to end disputes over the great questions which concern the country at large. The perfect balance between the departments is of

the essence of the matter. The judiciary is the balance wheel, for there would be but little use in having a Constitution if Congress or State legislatures could ignore it, and there would be but little use in having a judiciary if some body which did not like the decision could defy it or overrule it.

It must always be borne in mind that the American judicial system was an evolution, and not an accidental creation inspired by the exigencies of a moment. The American judiciary is not an excrescence; it is not a limb nor a function; it is an organ. It is a vital part of our body politic, and it is as dangerous to hack at or cut it to pieces as it would be to prick the kidneys of a man with repeated thrusts of a needle or the jab of a stiletto. A political Bright's disease would soon set in if the judiciary were deprived of effective working power. All questions touching the judiciary are questions affecting a vital organ, an organ indispensable not only to political health but to political life in America itself.

Let us now consider how the judiciary got into this relation to our body politic. In Colonial days there were courts, of course, but they depended directly or indirectly on the British Crown, according to the forms of the charters. When the American Revolution came on and Independence was declared in July, 1776, the tie that bound the colonies to the throne was sundered. Then there were thirteen separate States, each an independent sovereign. Each of them went to work after her own fashion to make a Constitution for herself, some of them more speedily than others. All of them had judges, but in some the judges were chosen by the popular body which had legislative power. In others the judges were appointed by the Governor and the Legislature; in others by the Governor and his Council. There was no very clear enumeration or distribution of powers. Much was said about the rights of the people, but it was general and vague and did not specify with particularity the boundaries of jurisdiction. There was a general confusion of executive, legislative and judicial duties. Some States had clearer notions on the subject than others. In the meantime a general object lesson for all the States was presented by the affairs transacted by the Continental Congress. The thirteen Articles of Confed-

eration were tried and failed. There was no proper executive. The President of Congress was merely a Speaker or moderator of debates. Executive business was handled by committees. There was but one house, and there were no courts. Judicial functions were performed by committees. Behind all this there was an absence of power. Nothing could be enforced. Every resolution of the Continental Congress had to be sent to the thirteen States for ratifying action, many of the States were tardy, and there was no means of driving them into line. It is a long story, a familiar one, a very interesting one, but finally came the Convention which framed the Constitution of the United States. By this time the great statesmen were ready for their work. They had learned their lessons in the best school, that of experience, but they had studied books as well as suffered in war. They knew all about every form of government the world had ever seen, from Achaean Leagues in Greece and the Republic of Rome before the days of the Empire, and the Italian Republics, and the States General of Holland, and the Revolution in England and the resulting Kingdom in England, as well as the contrasted Monarchies of France and Germany. They had read Rousseau, Locke, Hobbes, Bacon and Harrington, but, better still, they had studied Montesquieu, who dwelt particularly on the importance of a separation of executive, legislative and judicial power. They had seen with their own eyes what a confusion there was in their own States, and they had heard with their own ears what a jangle there was of authority. Many of the members of the Federal Convention were especially well equipped for the task of framing a National Constitution. There were in all sixty-five men. Thirty-nine had been members of the Continental Congress. Seven were Signers of the Declaration of Independence. Thirty-one were lawyers by profession, of whom four had studied law in the Inner Temple in London, and one had been to Oxford and heard the lectures of Sir William Blackstone. Ten had been judges in their own States. One had been a member of the Committee of Congress styled The Court of Appeals in Cases of Capture. Seven had served on committees to settle disputes between the States as to boundary lines. Eight had helped to frame the Constitutions

of their own States. Three had revised the laws of their own States. Eight had been Governors of their respective States. Five had been present at the Annapolis Convention, and three were recognized as oracles upon questions of International Law. With a full knowledge of the evils and weaknesses of the Confederation, and with a perfect familiarity with all those instances of a quasi federal jurisdiction which had arisen during the time of the Revolution, the Framers of the Constitution took up their task. It is plain that they confronted two palpable conditions: first, that there were many cases where the States could not act without conflict; and, next, that the confederated government lacked the power and the organs to do final and effective justice. Stress was therefore laid upon these salient features, and a scientific distribution of power was made between the executive, legislative and judicial branches of the government. The President was to execute the laws. The laws were to be made by Congress, consisting of two houses, and these laws and the Constitution were placed under the guardianship of the Supreme Court and such inferior tribunals as Congress might establish. The Courts of the United States were to have exclusive jurisdiction of certain classes of cases, and finally the Constitution and laws of the United States were to be recognized as the supreme law of the land, and the judges in every State were to be bound thereby, "anything in the Constitution or laws of any State to the contrary notwithstanding."

The matter did not rest upon theory alone. Prior to the time that the Federal Convention met it had become an interesting question in the States but recently emancipated from the sovereignty of Great Britain, as to how far a court could go in dealing with an act of the legislature, and the courts in solving this task in several of the States dealt with that feature which is peculiarly American, a written State Constitution. The earliest, and I think I may say the clearest, expression of what is now familiar judicial doctrine, was given by George Wythe, Chancellor of Virginia, in the year 1782, in the case of *Commonwealth* versus *Caton*, 4 Call's Reports, page 1. The case was argued by Mr. Edmund Randolph, then Attorney General of Virginia, subsequently her Governor, and later the first Attorney

General of the United States and one of the leading members of the Federal Convention, who in the course of his argument discussed whether an act of the Virginia Legislature passed in the year 1776, taking from the executive the power of pardon in cases of treason, had or had not violated the State Constitution, and particularly whether the court was authorized to declare such an act void because of conflict with the Constitution. Chancellor Wythe, himself subsequently a Framer of the Constitution, and in this very case of Caton sitting as a judge, declared "If the whole legislature (an event to be deprecated) should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united efforts at my seat in this tribunal, and, pointing to the Constitution, will say to them, 'Here is the limit of your authority, and hither shall you go but no further.' " John Blair, also a member of the Federal Convention, but at that time an associate of Wythe and later one of the first appointees by George Washington to the bench of the Supreme Court of the United States, was of the opinion that the court had power to declare any resolution of the legislature, or of either branch of it, to be unconstitutional and void if in conflict with the Constitution.

Six years later in 1788 the question was again raised in the very interesting "Case of the Judges," 4 Call, 135, which grew out of an attempt by the legislature to impose additional and extra judicial duties upon the court, and the judges found themselves obliged to decide "that the Constitution and the acts were in opposition, that they could not exist together, and the former must control the operation of the latter."

These views were again declared in several later cases, and were directly enforced in 1793 in Kemper versus Hawkins, 2 Va. Cases, 20. See also *Turner* versus *Turner*, 4 Call, page 234, and *Page* versus *Pendleton*, Wythe's Reports, 211.

In New York a substantially similar question in principle was raised in the celebrated case of *Rutgers* versus *Waddington* decided in 1784. There Alexander Hamilton in an able argument before the Mayor's Court of New York City, contended that the Trespass Act, which authorized owners to bring actions

against those who had occupied their houses under British orders during the British occupation, was unconstitutional. Hamilton argued that the law violated natural justice, and the decision was placed upon that ground. *Rutgers* versus *Waddington*, Dawson's Pamphlet, page 44. Hamilton's Works, edited by J. C. Hamilton, volume 5, pages 115 and 116; volume 7, page 197.

In Rhode Island the famous case of *Trevett* versus *Weeden* was decided in 1786. (See a scarce pamphlet of J. B. Varnum, published in Providence in 1787.)

In passing I might say that this case was the first instance of an attempt at judicial recall and signally failed. A butcher had sold meat and his debtor tendered payment in the paper money then recently authorized by the legislature of Rhode Island. The plaintiff objected to the tender on the ground that the contract had been made prior to the passage of the law, and that paper money could not be thrust upon him without his consent. The judges sustained the contention, and, the decision giving great offense to the legislature, the judges, having been themselves chosen by the legislature, were attempted to be thrust from their judicial offices. They protested against such an invasion of the independence of the bench in a manner so able as to secure the defeat of a resolution of the legislature declaring their offices vacant. A similar case, so far as the principle of judicial right to review an act of the legislature and compare it with the State Constitution, arose in the case of *Holmes* versus *Walton*, referred to in *State* versus *Parkhurst*, and reported in 4 Halstead, N. J., 444. See also Paper by Doctor Austin Scott in volume 2 of Papers of the American Historical Association, page 86. In North Carolina in the case of *Bayard* versus *Singleton*, Martin's Reports, page 42, the argument was made by Mr. Iredell, subsequently an associate justice of the Supreme Court of the United States, that the court had the power to refuse to enforce a law because unconstitutional.

It is beyond the reach of controversy, therefore, that when the Federal Convention met in 1787 for the purpose of framing a Constitution for the United States, the idea of controlling the legislature through the judiciary was familiar to its leading members. It had been asserted in Virginia, New York, Rhode

Island, New Jersey and North Carolina. The members of the Convention who had, either as counsel or as judges, considered such a question, were among the most prominent on the floor. There were from Virginia, George Wythe, John Blair, Edmund Randolph and George Mason; from New Jersey, David Brearly; from New York, Alexander Hamilton; from North Carolina, Richard Dobbs Spaight, informed specifically by his correspondence with Iredell, the counsel in the case of *Bayard* versus *Singleton*. It is unnecessary for me to go into detail in quoting the language of the debates in the Convention itself, but no careful student of Madison's Notes, or of the Journal of the Convention, can fail to reach the conclusion that it was generally admitted by the delegates that the courts would have the power under the Constitution without any express gift. Such a power was commented upon with approval in the Convention by Gerry of Massachusetts, Morris of New York, James Wilson of Pennsylvania, Mason of Virginia, and Luther Martin of Maryland. It was opposed by Mercer of Maryland and John Dickinson, then of Delaware, formerly of Pennsylvania.

While the ratification of the Constitution of the United States was under discussion in the different States, the matter was elaborately treated of in Nos. 78 and 80 of the Federalist, touching particularly upon the independence of the judiciary and the existence of the power to pass upon questions of constitutionality was taken for granted. It was commented upon not as a mere possibility, but in order to remove any lingering objections there might be to such a practice. In the State Conventions the matter was discussed, in Connecticut by Oliver Ellsworth, who called the judiciary "a constitutional check"; in North Carolina by W. R. Davies; in Pennsylvania by James Wilson; and in Virginia by John Marshall, Edmund Randolph and Patrick Henry. The last named was a decided opponent of the Constitution, but he was an earnest advocate of the independence of the judiciary. He believed that the judges should decide upon the constitutionality of a law, and feared that the National Judiciary as organized would not possess sufficient independence for this purpose.

It is now in order to trace the spread of the doctrine through

the decisions of the Supreme Court of the United States. The Judiciary Act of 24 September, 1789, which was the work almost exclusively of Oliver Ellsworth, the third Chief Justice of the United States and himself a member of the Federal Convention, although he was aided in part in the drafting of the statute by Richard Henry Lee of Virginia, both men being entirely familiar with the views of their colleagues, provided for the review in the Supreme Court of the United States of judgments in the circuit courts and district courts upon writs of error, as well as upon a certificate of division of opinions, whether the causes originated in the circuit courts or were removed there *from the State courts, as well as for the review of cases where the validity of State statutes or any exercise of State authority should be drawn in question, on the ground of repugnance to the Constitution, treaties or laws of the United States, and the decision should be in favor of their validity.* This statute, which it is no exaggeration to term a veritable bond of union, is a clear legislative expression of the views of the first Congress under the Constitution—that the questions referred to are judicial questions, and that the determination of them belongs, under the Constitution, to the Supreme Court.

The first case in which the power of the Federal courts to decline to enforce an act of Congress was asserted illustrates the prevailing idea as to the position of the judiciary, as well as the extreme modesty of the judges. The case is Hayburn's, 2 Dallas, 409. Congress had passed an act in March, 1792, providing for the settlement of claims of widows and orphans barred by certain limitations, and regulating claims for naval pensions. The act directed the United States Circuit Judges to pass upon such claims and make their decision, subject to review by the Secretary of War and by Congress. In the Circuit Court for the District of New York, Chief Justice Jay, Justice Cushing and District Judge Duane filed an order declining to execute the act as judges, but declaring that "As the objects of this act are exceedingly benevolent and do honor to the humanity and justice of Congress, and as the judges desire to manifest on all proper occasions and in every proper manner their highest respect for the National Legislature, they will execute this act

in the capacity of commissioners." Justices Wilson and Blair and District Judge Peters, of the Circuit Court for Pennsylvania, absolutely refused to execute the act. Justice Iredell and District Judge Sitgreaves, of the North Carolina Circuit, before any case came before them joined in a letter to the President expressing their doubt as to their power under the law to act even as commissioners.

The question reached the Supreme Court at the August Term 1792, on an application for a mandamus to the District court for the District of Pennsylvania; Attorney General Randolph entered into an elaborate discussion and analysis of the powers and duties of the court, and advised the execution of the law. Of his arguments he said, "The sum of my arguments was an admission of the power of the court to refuse to execute, but the unfitness of this occasion." See Conway's Life of Edmund Randolph, pages 144 and 145. No doubt existed in the minds of the judges, yet so great was the desire to avoid a conflict that the motion was taken under advisement and held until the statute was amended.

A subsequent case, however, was brought by amicable action against one Yale Todd to recover money paid him under a finding of Chief Justice Jay and Judges Cushing and Law, acting as commissioners. After argument judgment was rendered against the defendant. No opinion stating the grounds of the decision was filed, but the result was a determination that, as the power conferred by the Act of Congress of 1792 was not judicial within the meaning of the Constitution, the act was unconstitutional. Chief Justice Jay and Justices Cushing, Wilson, Blair and Patterson were present at the decision, which seems to have been unanimous. See Note No. 1 to the Case of the *United States* versus *Ferreira*, 13 Howard, 40 to 52.

The question was again raised in 1798 in the case of *Calder* versus *Bull*, 3 Dallas, 386, and some doubts were expressed by Mr. Justice Chase as to the jurisdiction of the court to determine that any law of a State legislature contrary to the Constitution of the State, was void, but he declined to express an opinion whether the Supreme Court could declare void an act of Conress contrary to the Federal Constitution.

A similar question was raised in the case of *Cooper* versus *Telfair*, 4 Dallas, 194, where Mr. Justice Chase said, "It is a general opinion, indeed it is expressly admitted by all this bar, and some of the judges have individually in the circuits decided that the Supreme Court can declare an act of Congress to be unconstitutional and therefore invalid, but there is no adjudication of the Supreme Court itself upon the point. I agree, however, in the general sentiment." The learned judge had evidently forgotten the decision in the case of *United States* versus *Yale Todd*. The question was raised before Chief Justice Marshall in the famous case of *Marbury* versus *Madison*, 1 Cranch, 137, in which as Chancellor Kent declares "the power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any State legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration."

The language of Chief Justice Marshall is clear and conclusive.

"The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like any other act, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable . . . If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as though it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted upon. It shall, however, receive more attentive consideration. It is emphatically the province of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each, this is the very essence of judicial duty. If, then, the courts are to regard the Constitution,

and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law."

To characterize such reasoning as sophistry is childish. A school boy might as well challenge a proposition of Euclid or attempt to ridicule the Principia of Newton. Many men of an atrabilious critical disposition have stormed at it in impotent rage and have denounced it as mere *obiter dictum*, but notwithstanding all assaults it stands as an adamantine basis of reasoning, and constitutes the invincible buttress of our nationality. The power was not again seriously questioned in the Federal Courts for many years, until the question directly arose in *Cohens* versus *Virginia*, 6 Wheaton, 264. The reasoning of Marshall in that case has settled it forever. Nothing but a political earthquake can unsettle it. The great Pyramid of Cheops has stood for six thousand years unshaken by the barking of the jackals at its base.

A profound student of our institutions, the late Lord Brougham, has said, "The power of the judiciary to prevent either the State legislatures or Congress from overstepping the limits of the Constitution is the very greatest refinement in social polity to which any set of circumstances has ever given rise, or to which any age has ever given birth." As to Americans, an hundred volumes would not hold what they have said in its praise.

For practical illustration an instance or two may be given to show what we owe to this doctrine. New York tried to keep out the commerce of the Nation from the Hudson River by giving an exclusive right to one of her citizens to navigate that river with steam, and the State courts sustained it. The Supreme Court of the United States held that it was unconstitutional. The States of California and Missouri arrogated to themselves the right to prohibit the transportation of merchandise from other States except on payment of toll. The Supreme Court said that was unconstitutional. The State of Nevada tried the

same thing with reference to the travel of citizens of other States through her boundaries. The Supreme Court said that was unconstitutional. Other States have tried to compel the payment of a tax before a citizen of another State should be at liberty to buy or sell within their borders. Again the Supreme Court said that was unconstitutional. Monopolistic charters were upset in the same way. The powers of States to tax an agency of the Nation out of existence have been upset in the same way. The rights of the Government to regulate and control big corporations and to dissolve gigantic conspiracies in restraint of trade, have been sustained in the same way. Few laymen appreciate and many lawyers forget what we owe to this doctrine. It has saved us over and over again from discord and unhappiness as well as from business paralysis and loss.

As to the States, the instances are legion where snake bills and monopolies and all sorts of unfairness have been strangled by the courts. Yet we all know that attacks have been made upon the courts, some of them vile indeed, but the majority of the attacks are untrue and unfair. The courts, taken as a body, deserve and receive the confidence of the people. The man who would deliberately undertake to undermine and destroy the public confidence in the integrity and wisdom of the judiciary, which is our sheet anchor, deserves the fate of Guy Fawkes. No fair-minded man will rail against the church as an institution because some men in it are bigots and others are unchaste. No man would denounce doctors and surgeons as a learned profession because quacks and charlatans are to be found. No man would decry our universities and colleges because professors are sometimes shallow doctrinairies. No man would impugn the general honor of the American merchant because some of them cheat and sell spurious goods. No man will blacken the character of American labor because its strikes are sometimes violent and destructive. No man will deny the general good character of a community because he sees many sad lapses of conduct in individuals. Let us be fair to the courts.

Of course, the wise framers of our Constitution foresaw that there might be occasions for amendments to the fundamental law. They were not so shortsighted as to clamp a Constitution

upon the people like a straight jacket. They made the Constitution sufficiently flexible to admit of expansion and normal growth, and they also provided for those grave changes which in the course of time called for amendments. But, having taken the pains, after long and serious consideration, to frame constitutions based on experience and the teachings of human history, into which they built the results of suffering and war, they were careful that the changes to be made should be the result of equal deliberation. They did not expose their work to rash innovations. They knew that it was far easier to tear down than to build up. They knew that popular clamour is sometimes like a destructive storm. They wished to insure stability and wisdom in the Government. They did not believe in nostrums or curative quackery. They knew that men would not and could not be easy in their minds, either about their business, their property or their liberties, if the Government was subject to sudden and violent changes. Sound, steady government was what they aimed at. They knew that the jumping and thumping and rattling of an engine meant poor mechanism or a condition of danger. Hence they provided for orderly amendments through representative bodies whose work was finally to be submitted to the people. Detail as to the exact method in each State would be tedious and is not necessary to this discussion. The principle is that each amendment as proposed must first be passed upon by the representatives of the people, and finally ratified or adopted by the people themselves. There was no suggestion that war should be made upon one of the great departments of the Government, nor that the organ of a final exposition of the law should be made the target of abuse.

I am aware that there is a zone of authority already in possession of the judiciary, the invasion of which has been strongly and ably criticised and the further subjection of which is dreaded by many thoughtful and patriotic men as fraught with the danger of a subversion of the legislative branch. It lies upon the border line, and has given rise to differences of opinion even among judges themselves as to what is properly a legislative or a judicial question. I am also aware of the gradual shifting from time to time of points of view of the field of conflict, the determination

of the judicial attitude being settled at critical moments by a very narrow majority of the judges.

I cannot dwell upon these without blurring the sharpness of the outlines of my sketch, but I ought not to overlook their existence lest I should be mistaken for a blind zealot of government by the judiciary, which I am not. It is true, under all common law methods of development, essentially characteristic of Anglo-Saxon and Anglo-American liberty, that systems become overgrown in certain directions, and that rank shoots spring from trunk or branches, but no skilled or prudent husbandman would use the axe where judicious pruning would suffice. There is a need, and a crying one, I think, for a thorough study of the differences between legislative, executive, and judiciary power in the light of modern instances and a re-survey of the territory appropriate to each so as to guard against trespasses which are quite as common in executive officers as in legislators or judges. It might be, if such a study were seriously and reverently undertaken, that the judiciary would voluntarily withdraw from the determination of questions largely economic, social or political, and that legislators, alive to the performance of their duty, will face their responsibilities with courage equal to the task of stating in unambiguous terms exactly the legislative intent instead of the evasive cowardice which hides itself in statutes of doubtful import. It might also be that executive officers will cease to exercise the power of coercive persuasion and moderate their ambitions to wrest from the popular representative branch the right to initiate and mould policies. It may also be that the radicals, having instilled energy and vigor and a broader sympathy with the claims of Democracy into every department of the Government and the public service, will be willing to abate a little from the spirit of vandalism and consider the scope and character of amendments to the fundamental law without disturbing the rights of the Courts to pass on constitutional questions, and without marring the most expressive feature of our system.

It has been proposed, however, in certain quarters and seriously contended for, that decisions of a State Court on constitutional questions should be subject to revision by the people;

that in a certain class of cases, if any considerable number of the people feel that the decision is in defiance of justice, they should be given the right by petition to bring before the voters at some subsequent election, either special or otherwise, as might be decided, and after the fullest opportunity for deliberation and debate, the question whether or not the judges' interpretation of the Constitution is to be sustained. If sustained, well and good. If not, then the popular verdict is to be accepted as final. The decision is to be treated as reversed, and the construction of the Constitution definitely decided, subject only to action by the Supreme Court of the United States.

How crude this plan is, and how lacking in detail. Who is to determine what constitutes "a considerable number of the people"? What is meant by "defiance of justice"? Are we relegated to a state of nature? Is a decree of a court of justice, reached by sworn judges, learned in the law, to be put into the melting pot of the emotions? To whom is the petition for a general election to be presented, and what will happen if it were refused? Who is to decide about the special election? Where are the debates to be had, and who are the parties who are to deliberate, and who is to moderate or preside over the debates? Is the law to be kept in a state of uncertainty until the final vote is taken? How is the result of the vote to be certified, and by whom? To whom is it to be certified? How will it reach the Supreme Court of the United States? Who are to be the parties to the suit, how is the record to be made up, and what will happen if the Supreme Court of the United States reverses all that has been previously done? Passing by all these practical difficulties, let us concern ourselves with the principle involved. If it is urged that the decision of a court is to be subject to revision by the people, that moment you hamstring the courts and emasculate the law, because you have no principles, no rules, no authorities, no science, no means by which the people are to judge of the decision, except their own notions of justice. These will vary according to the time, place and circumstance. Men of brazen lungs or with a knack at story-telling, or with the subtilty of demagogues, will work on the passions and prejudices or will encourage envy, hatred, malice and all uncharitableness, and

there will be a Babel of confusion. In the next place, respect for law, which is our crying need, will vanish. The court and the decision will be the main subject of discussion, and abuse of the judges and a contempt for the law will become a part of the debates and deliberations. To keep up agitation over the courts in all the States of the Union about their decisions on constitutional questions, which will vary in every State and with each statute under consideration, will be confusion worse confounded if the majority of the people in the States do not all think and act alike. The loss to business, to orderly government, to respect for law, to certainty of the law, to uniformity of the law, will be incalculable. Everything will be swimming in a sea of uncertainty. It would give birth to a most irrational way of amending the Constitution by piecemeal and by chance. Law and justice, instead of being as stable as the hills, will become as unstable as the waves. So too my sense of reverence is shocked. I am not ashamed to confess that I do reverence American institutions. I do revere the wisdom of our sires. I do believe that that which has cost so much in blood and tears and money and patriotism, is worth saving. Heroes have died for it. Women have been widowed for it. Children have been orphaned for it. To chip off the expressive features of the Constitution bit by bit, to deface the noblest column in our Temple of Liberty, is nothing less than sacrilege.

It is now in order to ask what effects would the doctrine of the recall of judges, or the recall of decisions, have upon our judiciary? In the first place, it would destroy the independence of the bench. This is not a mere phrase. It is something of priceless value. For six hundred years our ancestors struggled to secure an independent bench of judges. From the days of William the Conqueror to those of William the Third judges were appointed by the Crown to hold during the pleasure of the monarch. If judges did something displeasing to the king they were dismissed. What did this mean? Every time a judge had the courage to declare that the king was subject to the law and could not rule arbitrarily, he was disrobed, in modern phrase "recalled." It is to the lasting honor of Sir Edward Coke, Lord Chief Justice of England, that when he was asked by James the First what he

would decide in a given case, he replied "That which a good judge ought to do, according to the facts and the law as I see them." He lost his place, but his bravery and independence inspired other men. Finally when the wretched puppets of the royal will, the infamous Scroggs, the pliant Wright and the bloody Jefferys had filled the land with scaffolds, and James the Second had abdicated the Crown, the new king, William the Third, announced as a fundamental doctrine of liberty that the judges should hold their places during good behaviour and not at the royal will.

All these things took place during the time that America was being settled, and our well instructed fathers knew them all. When it came to their turn to substitute the people for the crown as the source of sovereignty, they did not turn backward and put into the hands of the people the old kingly power of recalling judges. The Progressives of to-day fail to see that they are retrograding to ancient tyranny when they wish to subject the conduct of the bench to the will of the appointing power. Not so with our fathers. When in 1787, in the very hall in which the Declaration of Independence had been signed, they framed the Constitution of the United States, they built into the Constitution the independence of the judiciary, and they safeguarded it by expressly adopting the good behaviour principle, and by providing that judicial salaries should not be diminished during their terms, so as to prevent a compulsion of the judges by starvation to popular or executive will. The remedy for corruption or misbehaviour was by impeachment.

Our State Constitutions, while changing from time to time, so as to make the judges elective by the people for fixed terms preserved the independence of the bench in all other respects. The best description of an independent judge that I have ever read is given by Rufus Choate when he said, "If a law is passed by a unanimous legislature, clamoured for by the general voice of the public, and a cause is before a judge upon it, in which the whole community is on one side, and an individual nameless or odious on the other, and he believes it to be against the Constitution, he must so declare it— *or there is no judge.* If Athens comes there to demand that the cup of hemlock be put to the

lips of the wisest of men, and he believes that he has not sinned against the law, he must deliver him, although the thunder light upon the unterrified brow."

Who would honor a judge who quaked with fear in the presence of a mob, either inside or outside of the court house? Who would respect a judge, who, with his ear to the ground, sought to ascertain in advance of his decision what the people thought the decision ought to be? Who would revere a man or a body of men, though robed in ermine, who were ready to surrender their conscientious convictions, abandon their intellectual honor and integrity, and disregard their oaths of office, to pander to popular will? Who would not denounce the wretched coward who foreswore his duty to palter with the foul fiend of temptation known as popular applause? What would happen if fear misread true popular opinion? Who could measure the depth of that disgrace? Did Pontius Pilate cleanse his hands of the blood of a just man by washing them in public, or his conscience in saying "I surrender him to you?" Did the people display their wisdom and justice by preferring Barrabas to Christ? In the next place, the recall of judges, or the recall of decisions, would destroy the dignity and majesty of the law. If the people demand that a judge should decide at his peril lest he be recalled, it would at least be fair to give him notice in advance what public opinion was. How could this be done in a given case involving disputed questions of law and fact?

In the third place, the recall of judges would sweep the bench, and the judiciary department would be prostrated. It would not mean the recall of one judge, but the recall of all the judges who had participated in the decision of the majority of the judges, high or low, in the court of first instance as well as in the Supreme or Appellate Court. The mass of the people always claim for their action the right to a majority rule, but in this case they would deny the rule of the majority upon the bench, and by sweeping the bench of that majority leave it in possession of a feeble and cowardly minority.

In the last place, the recall of decisions would be worse than the recall of judges. Judges are but individuals, but decisions are a part of the law until met by the orderly methods of amend-

ment previously discussed. Certainty and uniformity of the law would be utterly lost. We have difficulties enough on that point, owing to our many separate State sovereignties, which we are striving to meet through our committees in State bar associations on uniform legislation. Why should we add to the trouble? Suppose the people of one State had one view and the people of another State had another view, and you multiply all this by the number of States in the Union, and you had to have a mass meeting in every county in every State to vote upon the recall of a decision, when and how could it be recalled until all the counties had been heard from and all the States had been heard from? In the meantime what is the law? What lawyer could safely advise his client? What business man would be safe in following the advice if any counsel were bold enough to venture an opinion? Is this the system of law and order which we have been taught to revere? Do we really desire a change?

Let me now contrast the present orderly method of reaching a final conclusion upon constitutional questions with the proposed revolutionary methods of the recall.

A constitutional question may arise under an Act of Congress, a foreign treaty, a State Constitution or a State statute, in a suit between citizens and foreigners, citizens of different States or citizens of the same State, and in this sense a corporation is to be regarded as a citizen of the State of its parentage. It may affect either civil or personal rights or property rights defined and guaranteed by the Constitution. No Act of Congress can be valid which is in conflict with the Constitution of the United States. No State Constitution can be framed in conflict with the Constitution of the United States, and no State statute can conflict either with the Federal Constitution or the Constitution of the particular State where it originated. Questions affecting a State Constitution are finally decided by the highest court in that State, and cannot be carried to Washington unless the allegation is one involving a provision of the National Constitution.

This is our system, and the principles announced are fundamental. They are necessary to the harmony of the Union. Observe the variety and the range of the questions, and observe also that they are not matters of economic policy. Policy is not

a judicial question at all, it is legislative. Hence the question for the court always is this, has Congress or the Legislature the power to pass the act? If it has no such power the statute falls. If the power exists the court cannot review the wisdom or the folly of the statute. This too is necessary to the harmony of our system. When a question lies upon the border line between the departments and arises out of a statute which is badly expressed, owing to uncertainty in the mind of the legislature as to its exact intent, the judicial task becomes all the heavier, and the matter is one of much nicety and difficulty. It is in cases of this kind that the greatest strain is put upon the bench. Every presumption, however, exists in favor of the constitutionality of an act, so that the burden is always upon the litigant challenging the constitutionality of a law. The judges will not assume that Congress or State Legislatures intended to violate the Constitution, or that they have violated the Constitution. They must be sure, by a preponderance of argument, that a law is bad. This too is fundamental. In the vast majority of cases the final decision is in favor of the constitutionality of acts. It is important to remember this, because the din recently raised might lead the incautious citizen to suppose that the courts are mowing down State statutes or Acts of Congress with such freedom as to amount to the general business of annulling the legislative will. Such is not the case. No matter how numerous the instances have been in a land as big and as subdivided as ours into many States, decisions setting aside acts of a legislature or of Congress are few in comparison with those where such acts have been sustained. The truth is that the judicial knife has been but sparingly used and only in cases of freedom from doubt, that condition being determined by the majority of the judges in the court of last resort. There is no other practical way. I have taken the time to count the number of decisions in the Supreme Court of the United States where acts of Congress were declared to be unconstitutional, and I find that from 1790 to the present time but twenty-two instances exist. During the same time they exercised the same power, without challenge as to jurisdiction, in relation to the statutes of States and Territories in one hundred and eighty-two instances.

The proportion of cases in which acts of Congress and acts of State Legislatures were sustained, particularly in the exercise of that salutary but vague power known as the police power, is as twenty to one.

It is clear that the questions to be considered are not those with which the people at large are generally familiar, or which they are generally prepared to discuss. The matter necessarily must turn upon the interpretation of written language as applied to complicated facts. It involves the highest exercise of trained intellects dealing with the specialty of constitutional law. Seventh-tenths of the lawyers in the land will frankly admit that they are not constitutional lawyers.

In view of the peculiar character of the discussion to be conducted, it must strike the thoughtful citizen that the notion that such questions as the overruling of these decisions of the court of last resort should be debated and deliberated upon by the people in mass meeting, with a view of recalling the judges or recalling the decisions, is about as grotesque and impracticable a proposition as can be made. But it has been contended that only where the decision is in defiance of justice, and a considerable number of people think so, that the doctrine of recall would apply. The fairest way of testing this is to take cases arising under what may be called the police power of the States, because these are the ones that touch citizens most closely in their persons or their property. To these may be added the tax cases as affecting property, and to these again may be added questions arising under workmen's compensation acts. Observe how problems may breed. Under the police statutes affecting the health and good order of the community, how easy it would be to secure a mass meeting of citizens, more or less superstitious and defiant, on the subject of vaccination or quarantine. Or take pure food laws. How easy it would be to get up in oleomargarine cases, for instance, an opposition on the ground of the injustice of taking and destroying the property of citizens selling an article which is entirely harmless as a food. Take tax cases, whether income or not, whether the single tax upon land or the exoneration of real estate, and how complicated the discussion must become, entirely apart from the question of the pro-

portion in which each class shall bear the burdens of the State, and entirely irrespective of the opportunities offered for fraud, perjury and evasion. Take then the Employer's Liability Acts. These exist in eleven States, in six of which the constitutionality has been questioned. These acts grew out of a very general sentiment that the burden of accidents in intrinsically dangerous trades should be so adjusted between the employer and the employee that the burden should fall directly upon the employer and indirectly upon the consumer, so that the shock of the accident might be borne ultimately by the community. With the justice of this policy the judges have no quarrel. Their difficulty has been to make the law square with the existing constitutional provisions which the people have permitted to stand. The constitutional barriers, if removed, would leave the judges free, but instead of clearing the way by intelligently considered amendments, an ungovernable rage is to be leveled at the judges. No blame should attach to that department of the government which did not create the barrier, and whose sworn duty it is to sustain the barrier as long as the people say that it shall stand. No just master would blame a servant for that which is not his fault. No just people will blame their judicial servants for that which is not their fault. If a man builds a solid wall across a road that he owns, it is neither rational nor just for him to turn his anger upon his driver for not smashing his vehicle against it. The very existence of the wall is a declaration of the master's will that driving in that direction is forbidden. Read the different Constitutions affecting employers' liability. Study the decisions of the courts. Look at the extreme intricacy of the questions. Observe the anxiety of the judges to give effect if possible to the statutes. In some of the States the principle has been adopted of accumulating an insurance fund in the hands of the State, or under its control, to which employers contribute, and from which injured workmen are paid. These laws have been sustained as constitutional. In others the principle of contract has been introduced, by which the employer and the employee agree, in the absence of express stipulations, to settle upon a tariff or scale of compensation for injuries. These laws have not yet been definitely tested. In other States both these

features are lacking, and in one of them the law was held to be unconstitutional by a unanimous court on the ground that the master in that case was entirely without fault or negligence of any kind. The accident was a pure accident without negligence on the part of the master, and under the Fourteenth Amendment of the Constitution of the United States, and under the State Constitution, it was held that no man could be deprived of his property without due process of law. What fair minded man can say that this is a ruling purely in defiance of justice? If it be just that a man's property can be taken to pay for another's injury when the man whose property is taken has committed no fault whatever, the same rule must apply to every man who employs laborers, whether few or many. Smarting damages will not be confined to corporations or to rich employers alone. The truth is that the reversal in the last few years of the long established rules of negligence, of assumption of the risks of employment, of the doctrine of the negligence of co-employees, and the modifications of the doctrine of contributory negligence, have given birth to problems of great perplexity. Can these be properly solved by mass meetings? But, whatever the difficulty, must we seek a remedy by recalling the judges and emptying the bench, or by recalling decisions and making the law uncertain, by planting ourselves upon the slippery ground of an alleged defiance of justice, where the point of view of what is justice is largely dependent upon whose ox is being gored? Then, too, how much of the decision is it intended to recall? If loss for an injury is to be paid for independent of fault, how long will it be before the principle is extended to making men pay their neighbors' debts, so as to prevent business unfortunates from becoming a burden to the community? Some men have argued that the extent of the doctrine of recall should be limited so as to guard against its too wide application. Let such define in writing just exactly what they mean. Let them sit down and try it. They will probably find themselves dealing with unfamiliar and edged tools. In their plight perhaps they will ask some friend to do it, whether layman or lawyer, and then present it at a mass meeting in the shape of a resolution. After it has been torn to shreds bit by bit by amendments offered through passion rather

than by reason, the resolution in its final form passes. What is the result? It is clear that whoever wrote the final resolution becomes a substitute for the judges in declaring what the law is, in short, becomes the final expositor of the law. He has not been elected by the people. He does not represent the people. He is not a judge. He is not trained in judicial forms of procedure or judicial systems, and representative government is at an end. The judiciary has been recalled. The decision has been recalled. Every mass meeting has its own set of resolutions. What then is the law? Who is to determine? Seriously, my fellow lawyers, is this what we are aiming at?

I confess to a feeling akin to awe when I contemplate the manner in which for a century and a quarter the judges, both Federal and State, have with rare exceptions upheld the independence of the bench, a doctrine which it cost our English sires six centuries of struggle to acquire, which is secured by the tenure of good behaviour, which is safe from the odium of appointing boards and commissions and licenses and privileges, which would sully the ermine by the blight of suspicion; that independence which knows no fear, which is no respecter of persons, which cringes to no governmental officer, which quakes at no hurricane of popular clamour, which knows nothing about the parties but everything about the cause, which does nothing for the sovereign, nothing for a patron, but everything for justice, which dreads no consequences save the stings of conscience for violated duty, which pronounces judgment as it is given to finite human understanding to see the law, that independence which is the most precious jewel in the people's treasure chest, which dissipates by its light the darkness of ignorance, and which gives assurance that never will a sober, righteous and self-respecting people, with a full knowledge of its value, permit the measureless abomination and the unspeakable sacrilege of the judicial recall.

In truth, so far as the thoughts of mortals may approach the divine mind, the architecture of our Constitution resembles that of the heavens, where States circle like planets about the Federal Government as a central sun, the source of light, power, harmony and beauty, productive of separate existences and destructive of none, while moving without collision or chaos to the majestic music of freedom down centuries of time.